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DEVISE TO A WIFE OF INTEREST IN REMAINDER WHICH SHE WOULD TAKE BY DESCENT.

In the case of *Kepper v. Schumaker*[1] the testator provided in his will that his wife should be trustee of all the property until his youngest child was fourteen years of age and "then my estate shall be settled and my wife shall have her third." Testator referred to his second wife who survived him together with several children by the first marriage. The widow accepted the provision under the will and cared for the children in accordance with its terms. She then filed a bill in equity asking for a division of the property so that her third interest might be set off to her. In 1882 this action for partition was decided and the decree of the court provided that the widow should take an absolute fee simple in the land set apart to her as representing her third interest. Under the Indiana statute at that time a second childless widow took a fee simple interest in one third of her husband's realty on intestacy subject to "her forced heirs," if her husband had children by a previous marriage.[2] In the instant case these forced heirs, children of the testator by his first marriage, brought an action to quiet title to the property given to the widow in the partition proceedings on the ground that the widow had taken a third interest subject to their right of inheritance and not an unqualified fee. The court holds in this case that since the circuit court had jurisdiction to determine all the rights of the parties in the original partition proceedings, and no appeal was taken within the statutory time, the question is now *res judicata*. The result is that the land goes to the heirs of the widow on her death and not to the children of the testator regardless of whether this interpretation of the will by the court in the partition proceedings was right or wrong.

This decision seems correct. The court in 1882 had jurisdiction over the parties incidental to determining the partition of the land and it therefore had jurisdiction to determine the extent of the interest which the parties should take and to interpret

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[1] 153 N. E. 417 (Appellate Court of Ind., Oct. 8, 1926).

[2] Section 3339, Burns 1926, which supercedes the proviso in section 24 of the statute of descent of 1852, being section 2487 R. S. (1881), and section 2644 R. S. (1894). The present section has been enforced since Feb. 24, 1899, and under it the second childless widow receives a life interest only and the children of the previous marriages receive a fee in remainder. *Thompson v. Henry*, 153 Ind. 56, 54 N. E. 109; *Cropper v. Glidewell*, 52 Ind. App. 52, 98 N. E. 1012. See also 18 Corpus Juris 826.

the terms of the will for this purpose. While the primary purpose of an action for partition is not to determine the title of the parties to property, it is nevertheless part of the equitable jurisdiction of the court fully to determine all the interests incidental to the partition of the land.[3] Subject to appeal in that action, the decision of the court was final.[4]

The question raised in the *Kepper case* on the merits is an interesting one, however, and since the court could not properly decide it in this instance, it may be interesting and valuable to consider the issues involved and reach a conclusion in keeping with the authorities on the subject. Under the Indiana law that applied at that time, a second childless widow was entitled to one-third of her husband's realty subject to inheritance of this land by the children of her husband by previous marriages.[5] Under this will, however, the wife received all the land in trust for a number of years and then a devise of "her third." Thus she received the interest in remainder after the termination of a particular estate and this interest was less in legal contemplation than the interest she would have received under the statute whether by descent or upon her election to renounce the will and take by statute. There is a rule of the common law which applies in Indiana although not in England today that where an heir receives exactly the same amount by will as he would take on intestacy then he is considered to take by descent and not by purchase.[6] This rule is based on the old common law theory that a title derived from descent is a higher and more honorable interest, a "worthier title," than a title derived from purchase. This is held to be so even though the title derived by descent is encumbered by a charge to pay legacies or debts, and the actual property received by the heir in this way is less than he would receive if he took by purchase.

[3] *Benbow v. Studebaker*, 51 Ind. App. 450, 99 N. E. 1033; *Irwin v. Buckles*, 148 Ind. 389, 47 N. E. 822; *Isbell v. Stewart*, 125 Ind. 112, 25 N. E. 160.

[4] *Long v. Schowe*, 181 Ind. 13, 103 N. E. 785; *Heritage v. Heritage*, 52 Ind. App. 76, 99 N. E. 442.

[5] See note 2, *supra*.

[6] "A devise to the heir at law is void, if it gives precisely the same estate that the heir would take by descent if the particular devise to him was omitted out of the will. The title by descent has in that case precedence to the title by devise." "The test of the rule," says Mr. Crosley, "is to strike out of the will the particular devise to the heir, and then if without that he would take by descent exactly the same estate which the devise purports to give him, he is in by descent and not by purchase." 4 Kent's Commentaries **506, *Stillwell v. Knapper*, (1880) 69 Ind. 558, 35 Am. Rep. 240; *Robertson v. Robertson*, (1889) 120 Ind. 333; 2 Tiffany Real Property (2nd Ed.) 1893.

There is the further rule that if the testator creates a particular estate by will and then leaves to the heir the same interest in remainder that he would take if the remainder had gone by intestacy, here also the devisee takes by descent and not by purchase.[7] In the instant case there was a particular estate of all the property in trust until the youngest child was fourteen and then the division of the remainder among the heirs. If we assume by his expression "then my estate shall be divided and she shall have her third" he meant to give to his wife and children the interests which they would have under the statutes of descent if the remainder were left undisposed of, it follows that in this case the testator has given to the widow the same interest in remainder by will which she would have received if the remainder had gone by intestacy.[8] The widow, therefore, took this property by descent and not by purchase. This precise point has already been passed upon in Indiana in the case of *Thompson v. Turner*.[9] This doctrine has been supported on the theory that there is no difference between the widow as heir and other heirs. Thus if we say that the intent of the testator in this instance was to give his wife the property she was entitled to under the statute, then under the Indiana decisions we must hold that the circuit court erred in the partition proceedings, and that the widow should have received the property subject to the claims of her forced heirs.

It seems that this phase of the law in Indiana as enunciated in *Thompson v. Turner* is the law in other jurisdictions that have passed on the question.[10] It is submitted, however, that perhaps this conclusion has been reached by an erroneous interpretation of the common law principles involved. The rule itself is an ancient doctrine of the common law which is justified on the ground that the heir would want to take the "worthiest" title and that it was more honorable for him to take property

[7] *Stillwell v. Knapper*, 69 Ind. 558, 35 Am. Rep. 240; *Donelly v. Turner*, 60 Md. 81; *Whitney v. Whitney*, 14 Mass. 88, 2 Tiffany Real Property 2nd Ed.) 1893.

[8] It will be noticed that the statute by which the second childless widow takes is one of descent and that it applies to any property which she receives by intestacy. Here the testator directed that she should have her third, by which he must mean her statutory third, since the division of all the property for the widow and the children is directed according to the statute, "then my estate shall be divided and she shall have her third."

[9] *Thompson et al. v. Turner et al.*, (1910) 172 Ind. 593. See also *Denny v. Denny*, 123 Ind. 240, 23 N. E. 519.

[10] *Gilpin v. Hollingsworth*, 3 Md. 190, 56 Am. Dec. 737; *Rice v. Burkhart*, 130 Ia. 520, 107 N. W. 308.

by right of descent than by grace of gift. Furthermore, at a time when in many instances the law required that the property descend in the blood of the first purchaser, it helped to keep family estates intact as well as to fulfill the probable intent of the testator.[11] At the present time, however, the incidents of a feudal society which made a title by descent more honorable than one derived from purchase do not apply at all in this country and the effect of descent upon the subsequent inheritance of property is far less significant now than at common law. It would seem *prima facie*, therefore, that this rule which is applied as a matter of law and regardless of the intent of the parties and which is justified by conditions that no longer obtain, should not be applied by analogy. There is no reason why it should apply here, since at common law the widow was not the heir of her husband and hence under the common law system this rule would not apply at all to a surviving widow.[12] Of course the rule is generally applied by analogy to the usual case of new heirs created by statute but where the widow is made an heir the situation is peculiar. There is ample authority to the effect that a widow who takes by will and does not elect to take her statutory dower takes her interest by contract and not by gift since in taking under the will she waives her statutory right.[13] Thus in so far as she is heir to the same extent as her statutory interest in Indiana, her situation is different from other heirs who receive their devise under the will as a pure gift and could not claim it if it were willed to another.

In Egland this whole doctrine has been abolished by statute; if a testator devises to his heir the same interest which he would take on intestacy the devisee takes by purchase and not by descent.[14] This seems the more practical doctrine and it may well be that the common law rule which obtains in Indiana should be changed to conform to the rule which they have had in England now for nearly one hundred years. Surely the English statutory rule gives effect to the intention of the testator. Under such a statute the decision of the circuit court in the partition proceedings would have been right. The interest of the widow was subject to the claims of her forced heirs only if she took the property by descent; if it came to her by

[11] 4 Kent's Commentaries, *504 ff.

[12] Williams Real Property 85, 2 Tiffany Real Property (2nd Ed.) 734.

[13] 1 Woener, Am. Law of Admin. (3rd Ed.) 404; *Isenhart v. Brown*, 1 Edw. Ch. (N. Y.) 411; *Carper v. Crowl*, 149 Ill. 465.

[14] Statute of 3 and 4 Will. 4 c 106, s 3 (1832). See Jarman on Wills, Vol. 1 (5th Ed.) 99. Also Challis on Real Property (3rd Ed.) 239.

purchase she would take her third interest in absolute fee simple.

Of course we do not know the theory upon which the court held that she took an absolute fee simple interest in the property. If the court held that she took her statutory interest by purchase it must hold that she took it free from the interests of her forced heirs although these interests are set forth in the statute, because one cannot create by deed *inter vivos* or by testamentory disposition an interest in land which is not recognized by the common law or by statute as capable of being created by the parties.[15] Thus at common law one might inherit certain property which on his death would go to the heirs of the first purchaser from whom he took it by descent, but he could not create such a limitation or inheritance by deed or will in a third person. Hence whenever one gives property to another according to statute if the transferee takes by purchase he can only take such interest as the transferor is able to convey and any limitations on that interest is held void. Thus we have the common law rule that if one creates an interest recognized by the law and conveys it subject to restrictions not recognized by the law, the qualifications are void and the alienee takes the interest free from the limitations.[16]

It is submitted: (1) that the English statutory provision by which the heir takes as purchaser and not by descent is an improvement on the common law rule that obtains in Indiana; (2) that even under the common law rule the courts might have made an exception in the case of the widow, since she was not an heir at common law and the common law contemplated that if she took a devise in lieu of dower she took by contract. In keeping with these conclusions, it follows that the decision of the court in the partition proceedings was wrong under the Indiana law as it is under the law in other jurisdictions where the rule has not been changed by statute, but that the court's decision is more in keeping with common law principles than the rule which now obtains.

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[15] 2 Jarman on Wills (5th Ed.) 16 ff.

[16] This assumes that the estate has been created and that the condition is a condition subsequent. See *Hoss v. Hoss*, 140 Ind. 551, 39 N. E. 255; 1 Tiffany Real Property (2nd Ed.) 276.